Supreme Court, U.S.
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No. 96-337

In The Supreme Court Of The United States

October Term 1996

LINDA AUSTIN,

Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly enforce the arbitration clause in the collective bargaining agreement governing Petitioner's employment by requiring Petitioner to exhaust the grievance and arbitration procedure prior to bringing a claim in federal court?

2. Does this Court lack jurisdiction over Petitioner's claim because she failed to file a charge of discrimination with the Equal Employment Opportunity Commission prior to filing a claim in federal court?

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[1]The parent corporation for this party is Owens-Illinois, Inc. This party has no affiliates or subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-337

LINDA AUSTIN,

Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Owens-Brockway Glass Container, Inc. respectfully contends that this Court should deny the petition for writ of certiorari which seeks review of the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

OPINIONS BELOW

The decision of the Fourth Circuit is reported at 78 F.3d 875 (4th Cir. 1996). The decision of the United States District Court for the Western District of Virginia is reported at 844 F. Supp. 1103 (W.D.Va. 1994).

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari correctly sets forth the Petitioner's basis for invocation of this Court's jurisdiction. Additionally, Respondent maintains that the failure of Petitioner and her counsel to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") as required by 42 U.S.C. § 2000e-5(b) (1989) and 42 U.S.C. § 12117(a) (1996 Supp.) deprives this Court of jurisdiction over Petitioner's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA").

STATUTORY PROVISIONS

The Petition for Writ of Certiorari correctly sets forth most of the statutory provisions relevant to this matter. The following additional statutory provisions are relevant and are reproduced verbatim in the Appendix pursuant to Sup. Ct. R. 14(f):

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

The Americans with Disabilities Act, 42 U.S.C. § 12117(a).

29 C.F.R. § 1601.8 (1993).

29 C.F.R. § 1601.9 (1993).

STATEMENT OF THE CASE

Statement of Facts

Petitioner has been employed by Respondent since 1978. In June of 1992, she allegedly sustained a work-related injury while working as an equipment cleaner/oiler greaser. Shortly thereafter, Respondent began paying her workers' compensation benefits and placed her on "Inactive-Occupational Medical Leave" status. Petitioner was never terminated by Respondent. As of the date that the District Court entered Summary Judgment in this case, Petitioner remained on inactive status with Respondent and continued to receive Virginia workers' compensation benefits. This fact is reflected by the presence of her name on the master list of employees in November 1993, the fact that the Union was never notified of her alleged termination, as would be required by the collective bargaining agreement, and the fact that she never received COBRA notification. J.A.[2] at 33-38.

Petitioner's employment is governed by a collective bargaining agreement ("Agreement") between Respondent and the Glass, Molders, Pottery, Plastics and Allied Workers International Union ("Union"). The Agreement contains a grievance-arbitration procedure which is applicable to "all disputes" arising between Petitioner and Respondent. The Agreement contains a broad non-discrimination clause which expressly incorporates the substantive and remedial provisions of the ADA and Title VII as terms of employment and specifies that any claims arising under those statutes are subject to the grievance/arbitration provisions of the

[2]All references to "J.A." refer to the Joint Appendix filed in the proceedings below with the Fourth Circuit.

Agreement. The non-discrimination provision includes the following:

> **Article 38: Fair Employment Practice and Equal Opportunities**
>
> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of . . . sex [or] handicap . . .
>
> 2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act . . .
>
> 3. Any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure.

Respondent and the Union have incorporated further protections for handicapped employees as follows:

> **Article 40: Handicapped Employees**
>
> 1. An employee who is physically handicapped or infirmed by reason of occupational injury or illness and who is unable to work his regular job will be placed on any job acceptable to him which he is physically able to perform in line with his seniority and qualifications . . .
>
> 2. This Contract will also be administered **consistently with those applicable laws preventing discrimination** as to qualified handicapped individuals. (emphasis supplied).

Petitioner made no attempt to utilize the Agreement's grievance and arbitration provisions prior to filing her ADA and Title VII claims in federal court, despite her explicit contention as stated by her legal counsel that the ADA claim is based upon the Respondent's alleged breach of Article 40 of the Agreement. J.A. at 106-107.

Petitioner failed to file an EEOC Charge concerning her ADA and Title VII claims prior to filing this suit. Petitioner argued below that the charge-filing requirement should be entirely waived because an EEOC representative allegedly refused to accept a charge from Petitioner's legal counsel during a telephone conversation or send her an EEOC charge form.

Proceedings Below

Petitioner brought this action seeking relief for Respondent's alleged violations of the ADA and Title VII. Respondent moved to dismiss on the grounds that the distinct court lacked jurisdiction because Petitioner had not exhausted her contractual remedies under the collective bargaining agreement and because she had not filed a charge with the EEOC. The District Court treated the motion as one for Summary Judgment and dismissed the case because Petitioner had not exhausted the grievance and arbitration provisions of the Agreement, citing this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), to the effect that agreements to arbitrate statutory discrimination claims are enforceable. The Court rejected Respondent's argument with respect to non-compliance with the charge-filing issue because it found a factual dispute concerning various telephone conversations between Petitioner and her counsel and a representative of the EEOC.

The Fourth Circuit affirmed. The Court noted that this Court made clear in *Gilmer* that agreements to arbitrate discrimination claims should be enforced unless the text or legislative history of the statute, or an inherent conflict between arbitration and the statute's goals, demonstrates that Congress intended to preclude a waiver of judicial remedies. The Fourth Circuit found that the text of the ADA and the Civil Rights Act of 1991 demonstrated Congressional intent to *encourage* arbitration and that there was no conflict between arbitration and those statutes. The Court held that the arbitration clause in the Agreement should be enforced and that Petitioner had to attempt to utilize the arbitration machinery before she could sue.[3]

REASONS FOR DENYING THE PETITION

1. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Petitioner argues that the Fourth Circuit's decision should be reversed because it is contrary to *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1974), and its progeny, *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284

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[3]Although Owens-Brockway argued that this result was justified under the FAA, the Court relied upon the analogous well-recognized federal policy favoring enforcement of arbitration clauses in collective bargaining agreements under the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.* Fourth Circuit precedent holding that the FAA does not apply to employment contracts, the Court said, precluded it from applying the FAA to enforce the arbitration provision. The Court did not accept Respondent's suggestion that it should reverse such precedent and join the majority of other courts which have concluded that the FAA applies to contracts of employment.

(1984), and subsequent cases which have elaborated on *Gardner-Denver*'s "essential rationale," including *Livadas v. Bradshaw*, 512 U.S. 107 (1994), *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), and *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). The decision below is readily distinguishable from the line of cases relied upon by Petitioner and is fully consistent with this Court's decision in *Gilmer*, 500 U.S. 20 (1991) for three reasons. First, the *Gardner-Denver* line of cases concern the issue of preclusion, while *Gilmer* and this case concern the enforceability of an arbitration agreement. Second, the potential tension between statutory and collective rights anticipated in the *Gardner-Denver* line of cases does not exist in this case because Petitioner's statutory rights have been expressly incorporated into the Agreement and because Petitioner seeks to recover for a breach of the Agreement. Third, unlike the *Gardner-Denver* line of cases, an arbitrator in this case would be authorized and required to decide Petitioner's contractual and statutory claims, which are synonymous.

Petitioner ignores the critical distinction between this Court's preclusion and exhaustion jurisprudence. In *Gardner-Denver*, *Barrentine*, and *McDonald*, this Court determined only the extent to which employees who had already submitted their statutory discrimination claims to arbitration under a collective bargaining agreement were precluded from later bringing those claims in court. As this Court observed in *Gilmer*:

> those cases did not involve the issue of the enforcement of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.

Gilmer, 500 U.S. at 35. Because those cases did not concern the enforceability of an arbitration agreement under the FAA, the Court continued, the "liberal federal policy favoring arbitration agreements" was not at issue. *Id.*

Because Petitioner has not yet attempted to utilize the grievance and arbitration procedures in the Agreement, this case, like *Gilmer*, involves the issue of the enforceability of an agreement to arbitrate statutory claims, not the preclusive effect of a prior arbitration award. This case, like *Gilmer* and unlike *Gardner-Denver*, implicates the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 35 (*quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); *see also Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (LMRA embodies a strong federal policy favoring compulsory arbitration of disputes concerning application or interpretation of collective bargaining agreement). An integral part of this policy is the requirement that an employee exhaust grievance and arbitration procedures prior to initiating a lawsuit. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). As this Court noted with respect to employees seeking redress for violations of a collective bargaining agreement under the LMRA:[4]

> federal labor policy requires that individual employees wishing to assert contract grievances must ***attempt*** use of the contract grievance procedure agreed upon by employer and union . . . And it cannot be said, in the

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[4]It bears repeating in this context that Petitioner's counsel has conceded that her statutory claims are predicated upon Owens-Brockway's alleged failure to comply with the provisions of Article 40 of the collective bargaining agreement. J.A. at 106-07.

> normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee *until the* employee has attempted to implement the procedures and found them so.

Id. (emphasis in original).

Apparently Petitioner argues that there is an absolute tension between the rights guaranteed by the Agreement and non-discrimination statutes which compels the conclusion that *Gardner-Denver* controls this case.[5] Because this is an exhaustion, not preclusion, case, Petitioner's concern for a potential for conflicting rights is premature. Petitioner has never attempted to utilize the grievance and arbitration provisions of the Agreement. Given the explicit incorporation of statutory rights in this collective bargaining agreement, the presumption should be that the grievance and arbitration machinery will vindicate any rights Petitioner may have in law and contract.

Petitioner's erroneous perception of potential tension between collective and individual rights is the second basis for distinguishing this case from *Gardner-Denver* and its progeny. This Court has expressly stated that such tension does not exist "where a collective bargaining agreement

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[5]This Court previously rejected Petitioner's contention that *Gardner-Denver* dictates that a union cannot bind its members to an exhaustion requirement because it would constitute a "waiver" of their statutory rights when it held that, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

contains provisions facially similar to those of Title VII." *Gardner-Denver*, 415 U.S. at 57. Such is the case with Petitioner's Agreement, which expressly incorporates the substantive and remedial provisions of the ADA and Title VII as terms of employment. Unlike *Gardner-Denver* and its progeny, this case does not present different contractual and statutory rights, because in this collective bargaining agreement those rights are the same; i.e., the law of the land *is* the "law of the shop." The fact that Petitioner's ADA claim is predicated upon a breach of the *contractual* provisions contained in Articles 38 and 40 underscores this fact.

The third basis for distinguishing this case from *Gardner-Denver* concerns the arbitrability of Petitioner's claims under the Agreement. The Court in *Gilmer* distinguished *Gardner-Denver* on the ground that Gilmer's employment agreement contained an agreement to arbitrate statutory discrimination claims, while the collective bargaining agreement in *Gardner-Denver* contained no such provision. *Gilmer*, 500 U.S. at 35. As in *Gilmer*, but unlike *Gardner-Denver*, an arbitrator under this Agreement is authorized and obligated to hear and resolve claims of discrimination. *See Gilmer*, 500 U.S. at 35; *Gardner-Denver*, 415 U.S. at 53.

Moreover, as in *Gilmer* and unlike *Gardner-Denver*, arbitration of Petitioner's claims is governed by rules which provide procedural safeguards sufficient to ensure that her statutory rights are protected. Under Article 32, § 4 of the Agreement, Petitioner's claims are governed by the rules of the American Arbitration Association ("AAA"). The AAA rules offer the same protections as the NYSE rules which this Court deemed to be adequate to protect Gilmer's statutory rights. *Gilmer*, 500 U.S. at 30-32; American Arbitration

Association, Labor Arbitration Rules, September 1, 1993. Sections 12-14 of the Rules provide arbitrator appointment procedures designed to safeguard against biased arbitrators; § 28 provide for discovery and that formal evidentiary rules other than relevancy and materiality will not apply; and § 38 requires that awards be in writing. AAA Labor Arbitration Rules, pp. 8-9; 12; 14. Furthermore, because the collective bargaining agreement incorporates all of the provisions of Title VII and the ADA, an arbitrator presiding over Petitioner's claims would have authority to award any and all remedies available under either statute.

2. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF ANOTHER FEDERAL APPELLATE COURT OR WITH A DECISION OF A STATE COURT OF LAST RESORT.

Petitioner argues that the Fourth Circuit's decision is in conflict with decisions of the Second, Seventh, and Tenth Circuits, as well as a decision of the Maine Supreme Court.[6] Review of the decisions relied upon by Petitioner, however, reveals that each is distinguishable from the Fourth Circuit's decision herein and does not provide a basis for the grant of certiorari.

Two of the decisions cited by Petitioner are distinguishable because they are preclusion, not exhaustion cases. In *Ryan v. City of Shawnee*, 13 F.3d 345, 346 (10th

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[6]Petitioner also relies on *Kirkwood v. Courier-Journal*, 858 S.W.2d 194 (Ky. App. 1993) in support of her petition for certiorari. Because this decision was not rendered by a state court of last resort, it does not support the petition. Sup. Ct. R. 10(a).

Cir. 1993), and *Winston v. Maine Technical College System*, 631 A.2d 70, 73 (Me. 1993), *cert. denied*, 114 S.Ct. 1643 (1994), the employees had already completed arbitration proceedings pursuant to their collective bargaining agreements, and the courts were concerned only with the preclusive effect of the arbitration award. These two cases, like *Gardner-Denver* and its progeny, do not implicate the "liberal federal policy favoring arbitration" under the FAA and LMRA. *Gilmer*, 500 U.S. at 35 (arbitration of disputes under FAA); *Lincoln Mills*, 353 U.S. at 455 (arbitration of disputes concerning collective bargaining agreements under LMRA). Because Petitioner has yet to utilize the grievance-arbitration machinery in the Agreement, this case, like *Gilmer*, concerns the enforceability of an agreement to arbitrate.

The Seventh Circuit's decision in *E.E.O.C. v. Board of Governors*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992), presents a completely different factual scenario than this case. That case involved a collective bargaining agreement which specifically ***denied*** employees the right to utilize the agreement's grievance and arbitration proceedings if they initiated administrative or judicial proceedings. *Id.* at 426. The EEOC brought suit to have the policy declared to be in violation of the Age Discrimination in Employment Act. The Seventh Circuit held that the policy violated the ADEA's prohibition against penalizing employees who exercise their ADEA rights, holding that "a collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA." *Id.* at 431. In addition to presenting a completely different factual scenario, the Seventh Circuit's decision truly involved a "waiver" of the employees' rights. In this case, there has been no "waiver" of Petitioner's statutory rights. Rather than removing a forum, the

Agreement specifically provides an initial forum for the resolution of Petitioner's statutory claims.

The Second Circuit's decision in *Tran v. Tran*, 54 F.3d 115 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996), is also distinguishable from the case at bar. As the Fourth Circuit noted, *Tran* involved claims arising under the Fair Labor Standards Act ("FLSA"), which, unlike Title VII or the ADA, contains no provision expressly endorsing arbitration. *Austin*, 78 F.3d at 882, n.2. While the Second Circuit's decision in *Tran* shares more factual similarities to this case than the other decisions relied upon by Petitioner, Respondent suggests that this critical distinction prevents those similarities from giving rise to a split between the Second and Fourth Circuits.[7]

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[7]Should the Court find *Austin* and *Tran* to be in conflict, Respondent respectfully suggests that, given the large number of cases which are factually and legally analogous to this case which are developing at the district court level, *see, e.g.*, *Pryner v. Tractor Supply Co.*, No. 95-C-211, Order of July 31, 1996 (7th Cir. 1996) (staying trial court proceedings pending employer's appeal of district court's denial of motion to compel arbitration under collective bargaining agreement); *Jessie v. Carter Health Care Ctr., Inc.*, 930 F. Supp. 1174 (E.D.Ky. 1996) (compelling arbitration under collective bargaining agreement); *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. 1529 (N.D.W.Va. 1995) (same); *Randolph v. Cooper Industries*, 879 F. Supp. 518 (W.D.Pa. 1994) (declining to compel arbitration under collective bargaining agreement); *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802 (C.D.Ill. 1994) (same); *Lagrone v. Tomasso*, 1992 U.S.Dist. LEXIS 21958 (D.Conn. 1993) (compelling arbitration), denial of certiorari in this case would allow the Court the benefit of a thorough exploration of these issues by other Circuits.

3. REQUIRING EXHAUSTION IS THE BEST WAY TO RECONCILE THE FEDERAL POLICY FAVORING ARBITRATION WITH PETITIONER'S STATUTORY RIGHTS.

Requiring Petitioner to submit her ADA and Title VII claims to grievance and arbitration prior to bringing suit in federal court is fully consistent with the statutory emphasis on voluntary compliance and resolution of workplace disputes short of recourse to the courts. This Court has long recognized the Congressional intent to promote voluntary compliance in resolving disputes arising under employment discrimination statutes. *See Gardner-Denver*, 415 U.S. at 44 (Congress selected cooperation and voluntary compliance as the preferred means for eliminating workplace discrimination). As the Court noted in *Gardner-Denver* with respect to compulsory arbitration under the LMRA, requiring arbitration before recourse to other judicial mechanisms has the advantage of permitting a dispute to be resolved to the parties' satisfaction, thus obviating the need for further legal action:

> By allowing the dispute to go to arbitration . . . those conciliatory measures which Congress deemed vital to 'industrial peace' . . . and which may be dispositive of the entire dispute, are encouraged.

Gardner-Denver, 415 U.S. at 50, n. 13. The Court elaborated further upon the ability of compulsory arbitration to facilitate the conciliatory process deemed vital to the statutory scheme of laws prohibiting employment discrimination:

> the grievance-arbitration machinery of the collective bargaining agreement remains a

> relatively inexpensive and expeditious means for resolving a wide range of disputes, ***including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee.*** An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration ***which may satisfy an employee's perceived need to resort to the judicial forum*** . . . For similar reasons, the employee also has a strong incentive to arbitrate grievances, and ***arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.***

Id. at 55 (emphasis supplied).

Lower courts attempting to reconcile *Gilmer* and *Gardner-Denver* have found that requiring exhaustion of arbitral remedies prior to legal action permits courts to give effect to the federal policy favoring arbitration while taking into consideration the concerns of statutory and collective rights expressed in *Gardner-Denver*. *See, e.g., Knox*, 899 F. Supp. at 1539 (requiring arbitration prior to court action effectuates Congress' intent to have Title VII supplement rather than supplant other remedies for employment discrimination "by allowing Title VII to co-exist with, rather than displacing, the policy encouraging mandatory arbitration of employment disputes under collective bargaining

agreements"); *Adams v. Burlington Northern R.R. Co.*, 843 F. Supp. 686, 691 (D. Kan. 1994) (interpreting *Gardner-Denver* as signifying that arbitration required under collective bargaining agreement should not be the ***sole*** remedy for statutory discrimination claims).

The efficacy of a policy which vindicates Petitioner's statutory rights with the federal policy favoring arbitration is apparent in the context of her ADA claim. Petitioner's rights under the ADA are not absolute; they are defined by, and subject to, the rights of other employees in her workplace. *See, e.g., Eckles v. Consolidated Rail Corp.*, 1996 U.S. App. LEXIS 20403, *30 (7th Cir. 1996) (ADA's requirement of reasonable accommodation does not require employees to be accommodated by sacrificing seniority rights of other employees under collective bargaining agreement); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995) (handicapped employees' right to reasonable accommodation does not require employer action inconsistent with contractual rights of other employees under collective bargaining agreement); *c.f. Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977) (right to reasonable accommodation of religious practices under Title VII does not supersede collectively-bargained seniority rights of other employees). Congress was clearly aware when it enacted the ADA of the potential for conflict between the obligations imposed on employers by the ADA and the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1988) ("NLRA").[8] S.Rep. No. 116, 101st Cong.,

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[8]For example, an employer who unilaterally implements an ADA accommodation requested by an employee is vulnerable to an Unfair Labor Practice charge by the union under § 8(a)(5) of the NLRA. Indeed, simply consulting directly with the disabled employee could violate the NLRA's prohibition against employers dealing directly with bargaining-unit employees. The same would be true of an accommodation requested

1st Sess. 2, 32 (1989); H.R.Rep. No. 485, 101st Cong., 2nd Sess., pt. 2 at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 304, 346. Congress' suggestion for avoiding such conflicts was for employers and unions to include provisions in the collective bargaining agreements permitting the employer to take all actions necessary to comply with the ADA. *Ibid.*

This is exactly what Petitioner and the Union did in their collective bargaining agreement. The Agreement at Articles 38 and 40 contains provisions expressly incorporating Respondent's duty to accommodate disabled employees. Petitioner's ADA claim is based on Respondent's alleged violation of Articles 38 and 40. The arbitrator's expertise at balancing collective and individual rights where an employee asserts a violation of a collective bargaining agreement is clearly and peculiarly appropriate in this context. Who better to determine whether, as Petitioner claims, Respondent's conduct violated Articles 38 and 40 of the Agreement than an arbitrator? *See United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (questions concerning interpretation of contract and merits of grievance are for arbitrator, not courts). If the Court refuses to compel Petitioner to attempt to utilize her contractual remedies to resolve her contractual and statutory claims prior to filing suit, Respondent, the Union, and Petitioner are deprived of a primary means of resolving Petitioner's workplace-based claims.

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by an employee based on religion, sex, race, or age.

4. PETITIONER'S FAILURE TO FILE AN EEOC CHARGE DEPRIVES THIS COURT OF JURISDICTION OVER HER CLAIMS.

Before filing a civil suit for a violation of Title VII, an aggrieved party must file a Charge with the EEOC. 42 U.S.C. § 2000e-5(b). The procedures of § 2000e-5(b) are applicable to a proceeding under the ADA. 42 U.S.C. § 12117(a). This Court has noted that the filing requirement is a jurisdictional prerequisite to a suit under Title VII. *See Gardner-Denver*, 415 U.S. at 47. While the Court later elaborated that the ***time limits*** for a charge ***filed late*** were not jurisdictional, but rather were requirements similar to statutes of limitations subject to waiver, estoppel, and equitable tolling, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1982), it has never held that a plaintiff may completely ignore the charge-filing requirement.

Even after this Court's decision in *Zipes*, most lower courts have continued to hold that the charge-filing requirement, as opposed to the mere requirement of a *timely* filing, is a jurisdictional prerequisite to maintenance of a Title VII suit. *See, e.g., Jones v. Runyon*, 91 F.3d 1398, 1399-1400, n.1 (10th Cir. 1996); *Davis v. N.C. Dept. of Correction*, 48 F.3d 134, 137 (4th Cir. 1995); *Nat'l Assn. of Governmental Emp. v. City Public Service*, 40 F.3d 698, 711 (5th Cir. 1994); *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *Butts v. City of New York Dept. of Housing*, 990 F.2d 1397, 1401 (2nd Cir. 1993); *Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874, 878 (3rd Cir. 1990). There is a statutory and rational basis for distinguishing the charge-filing requirement from the timeliness issue addressed in *Zipes*. The charge-filing requirement serves two important policy concerns which are not implicated by the timeliness requirement: 1) notice to the

charged party of an alleged violation; and 2) securing voluntary compliance with the law through conciliation, the primary goal of the EEOC. *Alvarado v. Board of Trustees*, 848 F.2d 457, 458-59 (4th Cir. 1988); *see also Butts*, 990 F.2d at 1401 (permitting plaintiff to litigate claim not first presented to EEOC would defeat purpose of notice provision -- encouragement of claim resolution through conciliation and voluntary compliance).

Because the charge-filing requirement is jurisdictional, and thus is not subject to equitable tolling or modification, the factual discrepancies which the district court found concerning the telephone discussions between Petitioner's counsel and an EEOC representative are legally insufficient to defeat summary judgment because none of the disputed facts were material to this issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Moreover, even if this Court were to determine that the charge-filing requirement is a procedural and not jurisdictional prerequisite, Respondent would be entitled to summary judgment because Petitioner's version of the actions she and her counsel took at the EEOC do not justify an equitable exception to the charge-filing requirement as a matter of law. Petitioner's evidence was that she attempted to file a charge over the telephone with an EEOC representative, who "refused to accept her complaint" or to send her a charge form. J.A. at 22. A few days later, Petitioner's counsel contacted the same EEOC representative via telephone and requested that Petitioner's claims be accepted over the phone. J.A. at 23. According to Petitioner's counsel, the representative refused to accept the charge, and "asserted [the EEOC's] authority to administratively reject any complaint in this manner." *Id.*

Despite the fact that Petitioner's counsel knew that the EEOC representative had no authority to "administratively reject" a charge, J.A. at 103, counsel decided not to send any writing to the EEOC on the basis of her belief that the EEOC would not have accepted the charge unless it was submitted to the EEOC regional office on an official EEOC charge form. J.A. at 98-99; 101. Petitioner's counsel made clear to the district court that she was not seeking equitable tolling of the time limits for filing a charge, but a *complete waiver* of the filing requirement. J.A. at 103.

This Court has recognized in the context of equitable tolling of the time limits for filing a charge that such relief is reserved only for the most deserving plaintiffs:

> federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Veterans Administration, 498 U.S. 89, 96 (1990). Petitioner was represented by counsel at all times relevant to

the dispute, and her counsel failed to exercise due diligence in preserving Petitioner's rights.[9]

Although Petitioner's counsel knew that the EEOC had no authority to administratively reject a charge over the telephone, counsel took no further action when the representative refused to accept the charge over the phone or send her a charge form. The EEOC regulations do not provide for Title VII or ADA charges to be accepted over the telephone. 29 C.F.R. § 1601.9 (1993). The regulations do not require that a charge be submitted on an EEOC form, only that they be submitted in writing and be signed and verified. *Id.* The regulations do not require that a charge be submitted to the EEOC regional office. Rather, they provide that a charge "may be made in person or by mail at the offices of the Commission in Washington, D.C., or any other of its field offices," the addresses of which are also provided in the regulations. 29 C.F.R. §§ 1601.8 (1993).

Petitioner's counsel, and therefore Petitioner, is chargeable with knowledge of the regulations concerning the means for filing a charge under the ADA and Title VII. *See Irwin*, 498 U.S. at 92-93 (party represented by counsel before EEOC is bound by counsel's actions and is noticed with all information with which counsel can be charged). The undisputed evidence surrounding the failure of Petitioner's counsel to properly *attempt* to file a charge is insufficient as

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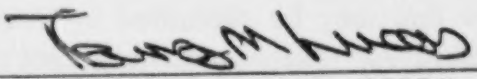
[9]The lack of diligence of Petitioner's counsel is also demonstrated by the fact that counsel *still* failed to file a written charge with the EEOC to protect Petitioner's rights after Owens-Brockway moved to dismiss on this ground, despite the fact that at that time almost one month remained before the expiration of the 180-day time limit for filing a charge.

a matter of law to warrant equitable relief from the charge-filing requirement.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

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STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (1989):

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

The Americans with Disabilities Act, 42 U.S.C. § 12117(a) (1996 Supp.):

> The powers, remedies and procedures set forth in sections . . . 706 . . . of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) shall be the powers, remedies, and procedures this title provides to the Commission . . . or to any person alleging discrimination on the basis of disability in violation of this Act . .

The Federal Arbitration Act, 9 U.S.C. § 2 (1987):

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Federal Arbitration Act, 9 U.S.C. § 4 (1987):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 U.S.C. §§ 1 *et seq.*], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . .

29 C.F.R. § 1601.8 (1993):

> A charge may be made in person or by mail at the offices of the Commission in Washington, D.C., or any of its field offices or with any designated representative of the Commission. The addresses of the Commission's field offices appear in § 1610.4.

29 C.F.R. § 1601.9 (1993):

> A charge shall be in writing and signed and shall be verified.